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No 86-994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

WALKBROADWAY, REALTY, INC.,

Appellant,

-vs.-

THE CITY OF NEW YORK,

Appellee,

ON APPEAL FROM THE NEW YORK
STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

DORON GOPSTEIN,
Acting Corporation Counsel
for the City of New York,
Attorney for Appellee,
100 Church Street,
New York, New York 10007
(212) 566-4022 or 3323

LEONARD J. KOERNER,
LARRY A. SONNENSHEIN,
DANA MARTINE ROBBINS,
of Counsel.

January 14, 1986

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OCTOBER TERM, 1986

WALKBROADWAY REALTY, INC.,

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- vs. -

THE CITY OF NEW YORK,

Appellee,

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

The appellee, the City of New York, moves to dismiss the appeal herein, or, in the alternative, to affirm the final order of the Court of Appeals of the State of New York entered on September 16, 1986, on the ground that the appeal does not present a substantial federal question.

QUESTIONS PRESENTED

1. Does the amended zoning resolution, which requires a developer undertaking the conversion of a commercial property to residential use to contribute to a fund for the relocation of displaced commercial and industrial tenants, deprive Walkbroadway Realty, Inc. of its right to due process of law, where the zoning amendment requiring the contribution became law after Walkbroadway acquired its alteration permit but before it undertook any substantial construction work or completed the eviction of the tenants?

2. Is the equal protection guarantee of the fourteenth amendment of the United States constitution violated by the "grandfather clause" of the zoning amendments, which exempts from the conversion contribution requirements owners who applied for a permit prior to the public

announcement of the City's proposed loft conversion policy and received the permit before enactment of the law, and owners who obtained a variance and permit prior to the enactment of the amendments?

FACTS

This appeal concerns the application of certain amendments of the Zoning Resolution of the City of New York to the proposed conversion from commercial to residential use of a "loft" building purchased by appellant Walkbroadway Realty, Inc. The Amendments, Article 1, Chapter 5, of the Zoning Resolution, govern the conversion of all premises in Manhattan Community Districts 1, 2, 3, 4, 5, and 6, erected prior to December 15, 1961. Section 15-50, et seq, the Relocation Incentive Program ("RIP"), of the Amendments conditions the conversion of premises from commercial or

industrial to residential use upon payment of a conversion or "RIP" contribution to the Industrial Relocation Fund administered by the New York City Business Relocation Assistance Corporation ("BRAC") or upon direct relocation payments to the tenants.

The amendments "grandfather" two classes of owners, permitting owners who obtain a permit before April 9, 1981, based upon an application filed with the Buildings Department on or before September 1, 1980, and owners who were granted a variance by the Board of Standards and Appeals ("BSA") prior to April 9, 1981, to proceed without regard to the provisions of Chapter 5.

The premises which are the subject of this proceeding are a fifteen story building located at 395 Broadway in an area of lower Manhattan zoned as a C6-4 commercial district. Walkbroadway Realty, Inc. ("Walkbroadway") entered into a

contract of purchase for the subject premises on September 30, 1980.

Prior to execution of Walkbroadway's contract for purchase of the subject premises, on September 2, 1980, amendments to the Zoning Resolution ("the Amendments"), governing the conversion of nonresidential buildings in lower Manhattan to residential use, were proposed, and certified for public review by the New York City Planning Commission ("Planning Commission"). In the course of these public hearings, an official of the New York City Planning Commission informed Walkbroadway that, if enacted, the amendments would apply to the conversion of the subject premises.

On December 8, 1980, Walkbroadway filed an alteration application with the New York City Department of Buildings ("Buildings Department") for

conversion of the subject premises from warehouse facilities to residential apartments.

On February 9, 1981, the Planning Commission adopted a resolution incorporating the Amendments into the Zoning Resolution (A101). Thereafter, the New York City Board of Estimate conducted further public hearings, and approved the Amendments, effective April 9, 1981 (A101).

The Buildings Department approved the application on March 6, 1981, issuing petitioner an alteration permit authorizing the conversion of the subject premises on March 9, 1981. However, as Walkbroadway had made no conversion contributions to BRAC or direct relocation payments to its tenants, the Manhattan Borough Superintendent of the Buildings Department, by letter dated July 30, 1981, notified Walkbroadway that its proposed conversion of the subject premises did not

comply with the Amendments, and that its alteration permit was accordingly revoked.

On August 14, 1981, appellant commenced an action, Walkbroadway Realty, Inc. v. City of New York, in the New York State Supreme Court, seeking a declaration that the amendments were unconstitutional as applied to it and asking for a permanent injunction prohibiting their enforcement against it. At the same time, Walkbroadway moved for a preliminary injunction against the City's enforcement of the Borough Superintendent's revocation order. Walkbroadway asserted that the choice between revocation of the permit or the necessity of making a cash contribution would cause it irreparable financial injury and the loss of the whole project. In support of this claim, Walkbroadway averred that out of a renovation project expected to

cost five million dollars it had already invested a total of $376,350, as follows:

a) $150,000 general contractor

b) $63,850.00 new heating plant

c) $35,000.00 architectural fees

d) $80,000 legal expenses

e) $10,000 mechanical engineers

f) $37,500 bank fee for construction loan[1]

The City cross moved to dismiss the complaint on the grounds that necessary parties had not been joined and that petitioner had failed to exhaust its administrative remedies by appeal to the BSA. On September 24, 1981, Walkbroadway and the City stipulated to the withdrawal of

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[1] Walkbroadway also asserted that it had signed a contract "obligating" it to pay $2,400,000 for renovations. No contract was presented to the Court to support this naked claim.

the motions by both parties, the reinstatement of petitioner's alteration permit, and Walkbroadway's deposit into an escrow account of approximately one-half of the amount of RIP payments which Walkbroadway would owe if the Court were to hold the amendments applicable to it. The stipulation also required Walkbroadway to file an application with the BSA for a determination of the precise amount of the contribution which would be required of it if the City prevailed in the action. On or about November 5, 1981, Walkbroadway filed an administrative loft conversion ("ALC") application with the BSA for a determination of the amount of its RIP contribution. Walkbroadway took the position that it was entitled to the discount in §15-54 granted to owners who make direct payments to the tenants prior to their eviction because it was precluded from making direct help payments

by the fact that it obtained its permit before the law went into effect (A170). However, at the hearing on June 8, 1982, Walkbroadway's attorney conceded that most of the tenants vacated after the passage of the law in April, 1981[2], and stated that Walkbroadway had elected not to set up an escrow account for displaced commercial tenants based on its belief that it was not subject to the zoning amendments.

At the close of a further hearing on September 28th, the BSA determined that Walkbroadway's conversion of the subject premises required a non-discounted RIP contribution of $848,254.50.

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[2] According to the attorney for the tenants who was also present at the hearing, many of the tenants were evicted in July, 1981, over three months after passage of the Amendments.

During the pendency of the ALC proceeding, Walkbroadway also filed an application with the BSA appealing from the Buildings Department's determination that the conversion of the subject premises was subject to the Amendments, and seeking an amelioration of the hardship it alleged would result from such application. On November 27, 1984, the BSA approved a resolution holding that the Amendments did apply to the subject premises. The BSA concluded that it was not empowered to address the equitable arguments raised by the applicant, and, accordingly, affirmed the determination of the Buildings Department.

By an Amended Petition, noticed December 21, 1984, Walkbroadway commenced an action (Walkbroadway v. City and BSA) pursuant to CPLR Article 78 challenging the determinations of the BSA. In the petition, Walkbroadway alleged that the decision of the

BSA was arbitrary and capricious; that the issuance of an alteration permit equitably estopped the City from applying the amendments to Walkbroadway; that the amendments were a taxation measure beyond the scope of the BSA; and that the amendments constituted a taking of property without just compensation, in violation of the due process clause of the fourteenth amendment to the United States Constitution. Walkbroadway further alleged that the grandfather clause of the amendments created various irrational distinctions in violation of the equal protection clause of the fourteenth amendment.

At the same time, the declaratory action (Walkbroadway v. City) was also restored to the calendar. Motions in both the declaratory judgment action and the Article 78 proceeding came before Special Term of

the New York State Supreme Court at one time.

OPINIONS BELOW

Special Term dismissed both actions brought by Walkbroadway. The Court noted the aim of the amendments:

> Here, the respondent B.S.A. is confronted with a difficult task. The area of Manhattan, especially below 59th St., is experiencing a great change. Loft buildings, traditionally the abode of commercial and industrial tenants, are increasingly going residential at the expense of these tenants (usually small to mid-size firms). What could the City of New York do to ease the trauma of the change and keep these commercial and industrial firms and their jobs in New York City? The City has enacted a plan wherein qualified removed tenants will receive direct payments or grants and/or loans from the Business Relocation Assistance Corporation ("B.R.A.C."). The source of these funds is to come from the purchasers of the property who chose to turn commercial loft space to residential units based on the square footage converted. Thus, the R.I.P. plan was instituted.

> Such funds help displaced business find new locations and help them modernize their facilities. It provides an incentive for these businesses to still contribute to the City economy rather than move to the Sun Belt or another out-of-City location. The method devised, setting up the R.I.P. plan, is extremely fair and logical.

The Court found that the amendments were properly applied to petitioner which had not acquired vested rights under the permit as "[a]ny conversion steps made before the amendments became effective were only preliminary." The Court also rejected Walkbroadway's argument that the City was equitably estopped from revoking its permit, finding that "petitioner had constructive and actual knowledge of the pending amendments." The Court addressed the constitutional issues:

> Also, the Court must agree that the petitioner's retroactivity agreement [sic] vis-a-vis the amendments is incorrect. A mere

preliminary step in obtaining a permit for conversion cannot serve to render the amendments unconstitutionally retroactive. Legislation is not unconstitutional merely because it may have some retroactive effect, or because it operates upon events occurring after its enactment even though antecedents of such events precede the legislation (In Re Gato's Estate, 276 App. Div. 651). Also, the validity of the retroactive aspects of an enactment should not be judged strictly from the concept of vested rights but by balancing all factors including considerations of fairness, reliance on preexisting law, the extent of the retroactivity, and the public interest to be served (Slewett & Farber v. Board of Assessors, 97 Misc2d 637, aff'd. 78 AD2d 403, vacated 80 AD2d 186, appeal dismissed 54 NY2d 771).

Thus, the amendments are proper, viable and present a lawful exercise of New York City's statutory zoning authority (see Marcus Associates, Inc. v. Town of Huntington, 45 NY2d 501). Surely, the court cannot agree that the zoning amendments effect an unconstitutional taking of petitioner's property. A municipality by zoning ordinances, may impose restrictions which effect the use, enjoyment and profitability of private property. These restrictions do not violate the constitutional rights of

> property owners (Golden v. Planning Board of Ramapo, 30 NY2d 359). The decision as to how a community should be zoned, as to how various properties should be classified or reclassified rests with the local legislative body and its judgments and determinations will be conclusive unless shown to be arbitrary (Iliasi v. City of Long Beach, 38 NY2d 383) and they will be upheld against equal protection challenges if they are reasonable and rationally related to a legitimate objective (Town of Huntington v. Park Shore, 47 NY2d 61).

Concluding that petitioner had failed to meet its burden of establishing the invalidity of the zoning amendments, the court noted that "[t]he naked invocation of various rights, constitutional and otherwise is not support."

The New York State Supreme Court, Appellate Division, First Department, in an order entered May 20, 1986, and reported at 120 AD2d 998, unanimously affirmed the judgment and order of the Supreme Court at Special Term.

The New York State Court of Appeals, on its own motion, in a judgment entered September 16, 1986, and reported at 68 NY2d 804 dismissed the appeal on the ground that no substantial constitutional question is directly involved.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL CONSTITUTIONAL QUESTION. THE ZONING AMENDMENTS, WHICH CONDITION THE GRANT OF A PERMIT TO CONVERT A BUILDING FROM COMMERCIAL TO RESIDENTIAL USE UPON A PAYMENT TO THE INDUSTRIAL RELOCATION FUND, ARE A LEGITIMATE AND CONSTITUTIONAL EXERCISE OF THE ZONING POWER.

The purpose of the Zoning Amendments, Article 1, chapter 5 of the Zoning Resolution of the City of New York, specifically §15-50 et seq, the Relocation Incentive Program ("RIP"), is stated in the preamble to this section:

15-51
Preamble

In order to reduce the deleterious effects on commercial and manufacturing uses caused by the reduction of existing floor area available to such uses as the result of the conversion of nonresidential buildings to dwelling units or joint living work quarters for artists, thereby increasing the value of such buildings, a Relocation Incentive Program is established. These general goals include among others the following specific objectives

a) To provide incentives for eligible commercial and manufacturing uses displaced by the conversion of commercial or manufacturing buildings or portions thereof to dwelling units, to relocate within the City of New York

b) To provide certainty to eligible commercial and industrial tenants as to the extent and availability of relocation incentives.

c) To ensure that such incentives are available to the eligible commercial or manufacturing uses at the time they relocate.

d) To assist in the retention of industrial firms and industrial relocation

> within the City of New York in accordance with the intent of this Chapter.

To this end, owners seeking to convert a structure from commercial to residential use are required to make a Relocation Incentive Program contribution into the Industrial Relocation Fund administered by the New York City Business Relocation Assistance Corporation.

It is well established that a zoning ordinance is a permissible exercise of the police power if its restrictions bear a substantial relation to the health, welfare and safety of the community. See Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365 (1926). It is beyond cavil that the zoning amendments, requiring a developer to contribute to a fund for the relocation of displaced industrial tenants prior to the

conversion of a commercial building to residential units, are a valid expression of the legislative goal.[3]

Notwithstanding appellant Walkbroadway's insinuation that it has been somehow victimized by the political system in New York City and forced to pay "tribute" (juris st., p. 7) to a greedy municipality blindly amassing revenue, the application of the Zoning Amendments to Walkbroadway has

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[3] The courts of New York State have long held that a zoning scheme may be implemented through the imposition of conditions, including cash contributions, upon selected types of development. Jenad, Inc. v. Village of Scarsdale, 18 NY2d 78 (1966) (approval of subdivision conditioned on local dedication requirement, including cash contribution option); Church v. Town of Islip, 8 NY2d 254 (1960) (change of zoning designation conditioned on size limitations, erection of fence, and planting of shrubbery); Holmes v. Planning Board of Town of New Castle, 78 AD2d 1 (2nd Dept., 1980) (permit conditioned on participation in overall development plan, including agreement to provide driveway easement).

not resulted in any deprivation of appellant's constitutional rights.[4]

The revocation of appellant's alteration permit was not an impermissible retroactive application of the zoning amendments. Appellant's due process rights were not violated.

Legislation is not impermissibly retroactive merely because it may have an impact on events having their antecedents before its enactment. United States v. Jacobs, 306 U.S. 363 (1939). See also State ex. rel. Van Emmerik v. Janklow, 454 U.S. 1131 (1982) (challenge to retrospective tax on utility; appeal dismissed for want of a substantial question). The Amendments, effective one month after Walkbroadway was

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[4] Appellant's attack on the impartiality of the New York State judiciary (juris st., p. 8) is utterly without factual foundation, and wholly improper.

granted an alteration permit, required Walkbroadway to make a conversion contribution for the benefit - either direct or indirect - of commercial tenants who were not evicted until some time after passage of the Zoning Amendments. Thus, the Amendments actually operate prospectively upon the evictions of tenants occurring after their effective date. The fact that the necessity of making the RIP payment may diminish the profits which appellant expected when it purchased the premises in September 1980, does not make application of the statute impermissibly retroactive. In Rogin v. Bensalem Township, 616 F2d 680 (3rd Cir. 1980), cert. den., 450 U.S. 1029 (1981) the Court of Appeals for the Third Circuit ruled that there was no violation of due process to a developer who was denied additional permits necessary to complete a condominium project, where the zoning

ordinance was amended to reduce permissible density midway through construction of the planned project. Southern Cooperative Development Fund v. Driggers, 696 F2d 1347 (11th cir), cert den'd., 463 US 1208 (1983), relied on by appellant (juris st., p. 8), is not to the contrary. In that case, the Court held that the Planning Commission could not deny a permit based on a subsequently enacted development code, where the developer, in consultation with the Commission, had changed its plans to comply with regulations in effect at the time of its application for a permit. The Court based its holding on the doctrine of equitable estoppel, finding that the Commission had deliberately delayed action on the developer's

application until the enactment of the zoning amendments.[5]

Nor has appellant been deprived of vested rights under New York law (juris. st., p. 9). See Matter of Jayne Estates v. Raynor, 22 NY2d 417 (1968); Matter of Perrotta v. City, 107 AD2d 320 (1st Dept.), aff'd on opn below, 66 NY2d 859 (1986); Lefrak Forest Hills Corp. v. Galvin, 40 AD2d 211 (2nd Dept., 1972), aff'd, 32 NY2d 796 (1973), cert denied, 414 US 1004 (1973). In order to obtain vested rights it is necessary that the owner have undertaken actual construction of a substantial nature. Syracuse Aggregate Corp. v. Weise, 51 NY2d 278 (1980). This construction must effect a tangible change in the property and

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[5] Appellant raised below the argument that the City was equitably estopped from revoking the permit but was unable to show any wrongdoing by the City.

cannot be of a mere preliminary nature. Rathkopf, The Law of Zoning and Planning, Fourth Edition (1965), Vol, 4, c. 57, p, 57-10; Cooper v. Dubow, 41 AD2d 843, 844 (2nd Dept.), app. den'd, 33 NY2d 518 (1973).

Most of appellant's claimed expenses - architectural and engineering fees, legal expenses, and bank fee for the construction loan - are clearly preliminary and do not give rise to vested rights. The only specific expense involving actual construction, the $63,500 for the new heating plant, must be disallowed.[6] Only

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[6] The other, unspecified $150,000 which appellant alleges was paid to the general contractor, cannot be considered in the vested rights analysis as the record does not indicate what this money was used for. Also, the contractual obligations incurred by appellant, where no money actually changed hands, do not establish "actual construction". See Gramaton Hills Manor, (Footnote Continued)

construction which cannot be used for other purposes can be considered in a vested rights analysis. Matter of Golden City Park Corp. v. Board of Standards and Appeals of the City of New York, 263 App. Div. 52 (2nd Dept., 1941), aff'd, 289 N.Y. 720 (1942). See also Matter of Andgar Associates v. Board of Zoning Appeals of Incorporated Village of Port Washington North, 30 AD2d 672 (2nd Dept.), app. den'd, 22 NY2d 648 (1968). Even assuming, arguendo, that the installation of the heating system is not disallowed by this rule, the $63,500 is not sufficiently substantial in relation to the estimated total renovation cost of five million dollars to give rise to vested rights. Town of Lloyd v. Kart Wheelers

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(Footnote Continued)
Inc. v. Manganiello, 30 Misc2d 117 (sup ct., Westchester Co., 1961); Rathkopf, supra, at p. 57-10.

Raceway, Inc., 28 AD2d 1015 (3rd Dept., 1967); Reichenbach v. Windward at Southhampton 80 Misc.2d 1031, 1035 (Sup. Ct., Suffolk Co.), aff'd on opinion below, 48 AD2d 909 (2nd Dept., 1975).

In diminishing the profits that appellant expected to earn when it purchased the subject premises, the Zoning Amendments did not effect a taking of appellant's property in violation of the due process clause. As this Court stated in Penn Cental Transportation Co. v. New York City, supra, 438 U.S. at 130:

> The submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.

Appellant's strategy is transparent. Appellant had notice of the impending zoning change from the very start, but simply shut its eyes to the law, and proceeded with the

eviction of tenants and conversion of the premises, hoping to circumvent the application of the Amendments by the acquisition of vested property rights. Appellant's cry that it was "shook down" (juris. st., p.6) by the lawful application of the Zoning Amendments is unworthy of reply. As demonstrated, the Zoning Amendments are a valid expression of the legislative goal of protecting and encouraging commercial activity in lower Manhattan. Quite simply, appellant has demonstrated no constitutional infirmity in the application of this legislation to it, and no substantial question necessitating review by the Supreme Court of the United States.

The "grandfather" provisions of the Zoning Amendment do not violate the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

Two classes of owners are "grandfathered" under the zoning resolution, and exempted from the conversion contribution requirement. The exceptions are as follows:

> **§15-013**
> **A. Building Permits**
> If, before April 9, 1981, a building permit was lawfully issued for an alteration based upon plans filed and pending with the Department of Buildings on or before September 1, 1980, construction pursuant to such permit may be continued, at the option of the owner, without regard to the other provisions of this chapter.
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> * * *
>
> **B. Variances**
> If, before April 9, 1981, a variance was granted by the Board of Standards and Appeals to permit the conversion of a building or portion thereof, to residential or joint living work quarters for artists use, which variance has not

> lapsed pursuant to the provision of Section 72-23, and a building permit was issued in accordance with the terms of said variance, construction pursuant to such permit may be continued without regard to the other provisions of this Chapter.

It is well-settled that classifications in statutory schemes will be upheld if they further a legitimate state objective and do not burden fundamental rights. In Vance v. Bradley, 440 U.S. 93, 97 (1979), this Court stated:

> We will not overturn a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

See also Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (classification in land use scheme held permissible); City of New Orleans v. Dukes, 427 U.S. 297 (1976) ("grandfather" provisions in licensing statute upheld). In Rogin v. Bensalem Township, supra, 616 F2d at 687, the Court of

Appeals for the Third Circuit specifically held that a zoning scheme which classified developers by the date they applied for permits did not contravene the equal protection clause of the fourteenth amendment.

It is manifest that the distinctions created by the Zoning Amendments are founded on valid reasons and further the objective of the statute as a whole. With respect to the exception in §15-013(A) for owners who applied for a permit before September 1, 1980, the crucial difference between an owner who applied for a permit prior to September 1, 1980 and an owner who, like appellant, applied after September 1, 1980, is that the former had no notice of the proposed zoning change. Thus, this provision is designed to protect owners who applied for their permits before the public announcement of the City's proposed loft

conversion policy on September 2, 1980. A failure to limit the benefits of §15-013(A) to those owners applying for conversion permits prior to September 2, 1980 would have given owners who learned of the impending legislation after September 1, 1980 an incentive to apply immediately for permits and hastily empty their buildings of the very job-producing tenants which the Amendments are designed to protect, in order to avoid paying relocation benefits upon passage of the Amendments.

The distinction in §15-013(B), limited to owners who obtained a variance and permit prior to enactment of the amendments, is equally reasonable. The grant of a variance represents a finding by the Board of Standards and Appeals that strict enforcement of the zoning resolution would impose a substantial economic hardship on the applicant and prevent the realization

of a reasonable return on the property. Thus §15-013(B) protects owners who have previously obtained relief from hardship from having the property once again rendered unprofitable, necessitating a duplicative, time consuming and expensive second variance application. These considerations have no relevance to an owner, such as appellant, about whom the BSA has never made a determination of hardship.

Where the grandfather provisions rationally further the legitimate objectives of the zoning scheme, it is manifest that appellant's equal protection challenge, like its other arguments, does not present a substantial constitutional question warranting review by this Court.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

DORON GOPSTEIN
Acting Corporation Counsel of
the City of New York
Attorney for Appellee

LEONARD J. KOERNER,
LARRY A. SONNENSHEIN,
DANA MARTINE ROBBINS,

of Counsel.